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QUESTION OF ORDER.—INTERESTED MEMBERS.

Mass. Gen. Ct. Rules House of Rep. 1563 28 Question of order

COMMONWEALTH OF MASSACHUSETTS.

HOUSE OF REPRESENTATIVES.

February 19, 1840.

A BILL to increase the capital stock of the Boston and Sandwich Glass Company being under consideration, and Mr. Church of Westport having moved an amendment in the following terms:—"*The private property of the Corporation, or Stockholders for the time being, and of those who shall be Stockholders at the time when any debt shall be contracted, shall be holden for the payment of such debt, and may be taken therefor on any execution issued against the Corporation for such debt, in the same manner as on executions issued against them for individual debts. Any Stockholder who shall pay any debt of the Corporation for which he is made liable, by this Act, shall have the same remedies for the recovery of the amount so paid, or any part thereof, as is provided in the 32d Sec. of the 38th Chap. of the Revised Statutes;*" and the yeas and nays having been taken on this amendment, Mr. Allen of Northfield called upon the Speaker to disallow the votes of Messrs. Safford and Quincy, of Boston, and of Mr. Baker of Dorchester, as being Stockholders in the Corporation, and as being therefore precluded from voting, under the fourteenth rule of the 2d chapter of the Rules and Orders, which is as follows:

"*No member shall be permitted to vote, or serve on any Committee, in any question where his private right is immediately concerned, distinct from the public interest.*"

The Speaker decided that those gentlemen did not come within the meaning of the rule, and declined excluding them from the count. From this decision Mr. Allen appealed, and thereupon the Speaker stated his reasons substantially as follows:

The Speaker said that he had already remarked to the House that the point which had been raised by the gentleman from Northfield was by no means a new one to him. During the first session in which he had the honor to occupy the chair of the House, he was twice called on to decide it. On both of those occasions he spared no pains in examining the authorities and precedents on the subject; on both of them he had the satisfaction to arrive at a clear and unhesitating conviction in his own mind; and on both of them, too, he had the still greater satisfaction of being sustained by a large majority of the House.

The first of these cases was that of one or more Bank Directors and Stockholders, whom it was proposed to exclude from serving on a Committee of one from each county, to which had been referred a Memorial from the Associated Banks, on the subject of the suspension of specie payments. The Speaker decided that Bank Directors and Stockholders were entitled to serve on such a Committee under the rule; and that decision, after a long argument in opposition to it by a gentleman not now a member, was sustained, 337 to 97.

The second case was that of sundry Stockholders in the Western Railroad Corporation, whom it was proposed to exclude from voting on the Bill for granting the credit of the State in aid of the enterprise in which that Corporation were engaged. The Speaker decided that those Stockholders were entitled to their votes; and that decision, also, was sustained, 238 to 43.

These cases differed considerably from each other, and both of them, in some degree, from that now under consideration. The former related to a whole class of corporations, the doctrine advanced in opposition to the Chair being, on that occasion, that no Director or Stockholder in the 118 Banks in this Commonwealth could serve on any Committee, or give any vote on any question relating to Banks and Banking. The latter related only to a single Corporation, and in this respect was analogous to the case before the House. It was obvious, however, that all three of them involved the same general principles, and must be governed by the same parliamentary precedents.

There was one point in which the Speaker said he was glad to find all these cases agreed. In neither of them did his decision *affect results*. The Committee, on which the Bank Director was permitted to serve, could of course do nothing *final*. Their proceedings, like those of all other Committees, were controlled by the House. So also in the second case, had all the Stockholders in the Western Railroad Corporation, who were members of the House, been deprived of the right of voting, the aid of the State would still have been granted by a handsome majority. And so in the present instance, too, should the three gentlemen who have been named as stockholders be excluded from the count, there would remain a majority of 37 to dispose of the amendment of the gentleman from Westport. The Speaker trusted that these circumstances would insure to the question on the present occasion, as they doubtless had in the previous instances in which it had been raised, a more calm, deliberate, and dispassionate investigation, than if an important issue were immediately involved in its settlement.

Such an investigation he thought it eminently deserved. In his judgment it was a question of high importance and of far-reaching responsibility. Other corporations were concerned in its settlement beside the Sandwich Glass Company—Corporations of a different class and character. The real question before the House was, whether *the City of Boston* should be deprived of two of its members legally chosen and duly qualified, and *the Town of Dorchester* of one-third of its rightful representation here, on an allegation that the private interests of the members referred to were inconsistent with a faithful discharge of their duty to their constituents? It was the right of the Towns and Cities, and not of the members themselves, which was really at stake in this and in all similar cases. And gentlemen would do well to bear in mind that though the controversy might now relate to a City and a Town which perhaps could afford to spare a vote or two—it might next be raised in relation to such as had but one Representative and thus disfranchise them altogether on particular questions.

The Speaker said, that as often as he had reflected on this view of the case, and it had been again and again the subject of his examination, he had been led to doubt both the policy and the justice of retaining in our Rules and Orders any such principle as that under which the question had been raised. The *power* of the House in all matters relating to their own proceedings might, perhaps, be unquestionable. The Constitution expressly gave them such a power and he supposed it to be absolute. They might silence members, he presumed, not merely in the case provided for, but in any or all other cases, subject only to their responsibility to the people. But *power* was obviously one thing, and *right* another. And he had often been led to question the right by which any portion of the Representatives of the people could say to any other portion, except where it might be absolutely essential to their own self-defence and self-preservation as a deliberative, Legislative Body, that they should not exercise the common and acknowledged privileges and powers of membership. All were

here by similar titles and upon similar terms. We were the Representatives of the several communities which had elected us, and our responsibilities were to them and not to each other. And it would seem no inappropriate reply, to any one who should attempt to interfere with another in the exercise of his duty as a member, and to exclude him in any case from his equal share in the collective will of the House, upon some allegation of his being disqualified for the service which his fellow citizens had assigned him—'Who art thou that judgest another man's servant? To his own master he shall stand or fall.'

The Speaker confessed, therefore, that, as a matter of principle, he was opposed to the rule altogether. But it had come down to us from a distant antiquity, and had been annually incorporated into our parliamentary system. It was his duty, accordingly, as the servant of the House, to observe and execute it. And he should not shrink from doing so, wherever its execution was called for. But the same views which had led him to question its justice in the abstract, would lead him also, now and always, to give it *the narrowest possible construction.* He desired to be personally instrumental in depriving as few of the representatives of the people as might be, of what seemed to him their just and rightful prerogative. And he had no hesitation in repeating what he said on this subject three years ago, that he should very much prefer to have any one or any number of his decisions set aside by the House, than to be guilty himself of setting aside the vote of a single member in a case in any degree doubtful.

Nor did scruples like these seem to have been confined to himself. Old as the rule was, and incorporated, as it had been, into all our Legislative Systems, National and State, it seemed to have been a very rare occurrence for it to be enforced, or even for any question to be raised under it. With the exception of a single case which had recently occurred in Congress during a very exciting discussion, and to which he would presently allude, he had no knowledge of any such point having been raised in any American Assembly but our own. Doubtless, there must have been such instances in some of our State Legislatures, but he had never met with any, and knew not where to find any account of them. During the long and agitating controversies, extending through so many successive years, as to the re-charter of the United States Bank in Congress, although partizan jealousies were sharply stimulated against that Institution, although not a few of its stockholders were known to be members, and although accusations of other sorts of interest in its continued existence were rife in all quarters, no such point of order is believed to have been started. The rule, by general consent, seems to have been left to operate upon individual consciences, inducing members to decline voting of their own accord wherever they felt they were liable to be swayed from the discharge of their duties by their private interests, or wherever, perhaps, they were unwilling to incur the suspicion of being thus swayed,—but to have been regarded as altogether too odious and too arbitrary to be put forcibly into execution.

But its execution had been demanded in this case by the gentleman from Northfield, and, in default of any American authorities on the subject, the Speaker said he was compelled to resort to the Parliamentary Annals of the Mother Country, from which the rule was originally borrowed, to find precedents for determining its rightful interpretation and legitimate intent. Even there the precedents were few and far between;—but the Chair was happy to state that all which he had been able to find had confirmed him in his opinion that *the strictest and narrowest possible construction* was to be given to the rule, which its terms would admit of. Even in an unreformed, rotten-borough House of Commons, where there was so little pretence to any Representation of the People on the principle of equality, and where so many of the members were without any direct responsibility to the People in the true sense of that term, there seemed to have been the utmost caution observed in disfranchising a member on any pretence of private interest. How much more ought such a caution to be observed in an Assembly so carefully constituted to insure equality and responsibility as ours!

There were but three leading cases in the English Parliamentary Journals on this subject, so far as the Chair had had an opportunity to examine them. The first in order was the Loyalty Loan case in 1797. This was a question about allowing an outright *bonus* or gratuity of five pounds in the hundred to the subscribers to a Loan called the Loyalty Loan, which had been made to the British Government in a great public exigency, and by which the subscribers had suffered a pecuniary loss. It was a measure purely of pecuniary relief and indemnification to private individuals. It was there decided that the interest of the subscribers was *direct* and *immediate.* It was a vote of money directly and immediately out of the public Treasury into their own pockets, and the votes of such of them as were members—except, indeed, of those who declared in their places that they did not intend to avail themselves of the *bonus*—were accordingly disallowed. This case, it would be perceived, was precisely analogous to the pension case supposed by the Chair a day or two since, when this point of order was first suggested, and did not go at all beyond it.

The second case was that of the London Flour Company, incorporated for the manufacture of Bread in the year 1800. By that bill certain persons were not merely incorporated for the purpose which has been named, but it was provided that they should be allowed 10 per cent. interest on monies advanced by them for the establishment, instead of 5 per cent. which was the legal rate of interest. In this case it was decided, that subscribers to the stock might vote on the passage of the Bill in all its various stages and upon all questions arising in relation to it, with the single exception of that relating to this provision as to the rate of interest which they should be allowed to receive. But on a motion to reduce this rate from 10 per cent. to 5 their votes were disallowed.

The third case was that of the Gold Coin Bill in 1811—a Bill introduced to remedy some of the evils growing out of a suspension of specie payments and a depreciation of Paper money in England—and in which it was alleged the Bank of England was deeply interested. The direct purpose of the Bill was to prohibit the purchase of Gold coins at any price above their par value in paper. The immediate intention was to bring up the Bills of the Bank of England from the state of depreciation in which their irredeemability had naturally involved them, and restore them to their full nominal value. On this occasion there were no less than 45 Directors and Proprietors of that Institution in the House of Commons, and the votes of all of them were allowed after much debate, *but without any division.*

Of these three cases, the only ones the Speaker had been able to find, the second manifestly presented the nearest analogy to that now before the House. It was, like this, the case of a Corporation whose Charter was immediately under consideration; and the question there, as here, was how far the Stockholders could vote upon that Charter. It was clear that if that precedent were to be followed, they could vote on the passage of the Bill from one stage to another, and on its final passage, and on all other questions relating to it, except where the question was solely and exclusively one as to the amount of their own profits. The principle of the case, as repeatedly laid down in the debate on the point of order, was—that where a Bill was partly of a public nature and partly of benefit to themselves, (and it was admitted that that Bill was of such a mingled character,) the stockholders might vote on the principle—but whenever the incidental point arose in which their own interests exclusively lay they could not vote.

This is substantially the rule of this House—by which

it is provided, that to exclude a member from voting the interest must be a *private* interest—or rather 'a private *right*,' (a word certainly of greater caution and which unquestionably justified a narrower construction than the English rule,)—*immediately* concerned and *distinct* from the public interest. And now the question was, whether the proposition offered by the gentleman from Westport involved directly and immediately such a distinct private interest of the Stockholders of the Boston and Sandwich Glass Company, and presented such a question of unmixed private right, as to exclude them from voting on it under the rule as illustrated by these precedents.

This inquiry rendered necessary some examination of the proposition itself, and the answer to it would undoubtedly depend not a little on the different views which were entertained as to the character and consequences of that proposition. Did this proposition of unlimited liability present to the House solely and singly a consideration of profit or loss to the Stockholders? Was it a naked, unmixed matter of private interest or private right to the Company? Had the public no concern in the question? If such were the case, the three gentlemen clearly could not vote upon it. But the Chair certainly did not regard it in that light. He looked upon the question of limited or unlimited liability, whether in reference to all Corporations or to one, as a question in which the public was deeply interested. He had always believed that where there was an unlimited liability, an *unlimited credit* was sure to follow—that instead of looking to the capital only, the public were led to place their trust on some indefinite amount of individual wealth behind it—that unwarranted confidence was thus certain to be created, while, at the same time, those of the Stockholders whose liability beyond their stock was worth any thing, were not less certain to withdraw from the concern—and that the security of the Corporation, of its creditors and of the community generally were thus at once and together put in jeopardy. The tendency of such a measure to drive capital out of the State, furnished another mode of illustrating the interest of the public in such a proposition. But, without entering further into his personal opinions as to the amendment in question, it was enough for him to say, that it had been argued from first to last on the express grounds of the public interest, the interest of the creditors and the interest of the community generally. No one had pretended that it was a mere matter of dollars and cents to the Stockholders—a simple question whether they should receive ten per cent. or five per cent. on their money. The very term *liability* was a relative term. Liability to what? Liability to whom? It was plain, and had been all along admitted, that, however there might be a private interest at stake, it was not presented *distinctly* from the public interest which was concerned also—but was involved and mixed up with it. And the precedents expressly asserted that where a matter was 'of a mixed nature, partly public and partly private,' Stockholders should be allowed to vote. He might go on to observe that there could be no certain evidence in the case of an individual Stockholder, whether he could have any private interest at all in the subject, as this must depend on the fact whether he had any property beyond that embarked in the concern, upon which this unlimited liability was to rest. If, in the case of the Loyalty Loan, the mere declaration of a purpose not to avail of the *bonus*, could exempt a subscriber from the operation of the rule, an absolute inability to receive either advantage or detriment from any particular provision, would certainly be no less effectual. But the views already taken he regarded as sufficient without so great a refinement; and he had only suggested it as an illustration of the extreme care which the precedents inculcated in the application of the rule in question.

The Speaker said that the case to which he had alluded as having recently occurred in Congress, was that of the New Jersey members, who were declared by Mr. J. Q. Adams, while in the Chair of the House of Representatives, to be entitled to vote on a question relating to their own case. The Speaker said, he had no record of that decision, and referred to it only from memory. It was a case, to say the least, as to which he should have felt quite as much doubt as about that now under consideration. He had been led to think of it, by one in some degree analogous, which seemed likely to present itself within a few weeks past, in reference to the two members from Mendon, whose seats had now been vacated, but who, it was well remembered, voted in every instance on their own case, down to the final *yeas* and *nays* on the question of declaring their election void. And even on that question they were not prevented from voting by the Chair or by the House. Now, some of the Parliamentary authorities expressly referred to *Election cases* as coming under the usage on the subject of interested members. One of the oldest precedents on record on this subject, he believed, was an Election case. He was glad, however, that, in the Mendon case, no point of order was pressed, and that he was relieved from the necessity of choosing between the authority of President Adams, fortified by his own deliberate private judgment, and the precedents of the parliament from which the rule had been borrowed. True, there was this marked distinction between the New Jersey members and the Mendon members,—that the former were provided with certificates of unquestionable validity, while those of the latter were believed to be without some of the requisite sanctions and signatures. But not even this would have reconciled him to depriving those gentlemen of their votes in one case, while the House permitted them to retain their seats at all.

It might be asked of the Speaker, *in what cases the rule was to be applied*, so as not to be altogether inoperative. The case of a pension had already been suggested. If a member of the House were a petitioner for a pension, bounty, remuneration or indemnification of any kind, the rule would clearly exclude him from voting on the question. A large number of resolves had already passed the House and others were still in the orders of the day, granting gratuities to persons who had arrested criminals, detected counterfeiters, &c. &c. &c. If any of these persons had been members of the House their votes must have been disallowed. Then there was a class of cases liable at any time to arise out of the conduct and character of members—when charges might be made against them upon which the House might find it necessary to proceed, or when by some gross violation of order and decorum in the House or of morality and honor out of it they might subject themselves to reprimand or expulsion. And questions might also, perhaps, occur in relation to Corporations on which the votes of the stockholders would be excluded under the precedent of the London Flour Company before cited. But these questions the Speaker believed could be very few, and the multiplication of them he thought would be attended with danger to the great fundamental right of the people to representation on the principles of equality. If members duly elected and qualified were to be deprived of their votes, as had been demanded, now and formerly, on every question relating to Corporations in which they may be associated with hundreds of other members of the community, and in the prosecution of a business which directly employs the labor of other hundreds of workmen, and indirectly of still other hundreds of agricultural producers—if such an interest in any qnestion as this, must be construed into "a private right distinct from the public interest" subjecting a member to a temporary disfrancisement, the right of the people to an equal representation on every subject of legislation, would be rendered precarious indeed. If the stockholders of such Corporations were to be deprived of their votes, how should it be with the stockholders of rival Corporations or even of individuals engaged in the same business, whose interests might be adverse and whose policy might be to

crush competition, if any such should chance to be members? How should it be with members who owned real estate in the vicinity of the establishment, with farmers who would sell their produce at higher prices owing to its neighborhood, or agents, or factors who had the sale of its wares and fabrics? All these might have interests fully equal to the stockholders. And with what class of Corporations should the proscription cease? How should it be with members of Municipal Corporations when questions of particular and exclusive interest to those Corporations should occur? On the questions of boundary between adjacent towns which were annually occurring, were the members from both towns to be ruled out from voting? If a strict analogy were to be observed between the proceedings of courts of justice as to jurors and witnesses and the proceedings of this House, such cases as these must clearly be comprehended under the rule.

There were others, too, besides members of Corporations, as to whose right of voting, questions must arise, if the rule were to receive such an extension? How should it be with Farmers on the bounties on wheat or silk? How with Inn-keepers or Grocers on the regulation of the sale of spirituous liquors? How with the members living in the vicinity of Charles River and Warren bridges, on the subject of restoring a toll to those decaying structures? The doctrines which two years ago would have deprived a Stockholder in any Bank in the Commonwealth from serving on a Committee, or voting, in reference to the entire subject of Banks and Banking, would seem to justify a similar proscription in all these cases.

But the Speaker said he would no longer trespass on the indulgence of the House. He was aware that gentlemen might at first sight be disposed to construe the rule as the gentleman from Northfield had seemed to construe it in appealing from his decision. And therefore, believing it to be a rule of doubtful constitutional justice, in derogation of the rights of the members, adverse to the equality of the representative system, and which, unless carefully limited, was capable of being wrested to the worst of purposes, he had felt bound to give to the House his honest views of its character and tendency, and to explain to them fully the grounds of his decision.

His own disposition would be never in any case to apply the rule to a case of corporate interest. Corporations had been so multiplied of late years, and their interests had become so closely interwoven with those of the whole people of the Commonwealth, that it was difficult to imagine cases in which they were entirely distinct. The interests of individual corporations even, partook largely of the character of public interests. To how large a number of persons must an interest be common, to be entitled to the designation of a public interest? The Western Railroad Corporation had some thousands of stockholders. Was the interest which a member held in common with thousands of others, to be regarded as a private interest? What, then, should be the numerical limit at which an interest should cease to be private, and be acknowledged as public? The members whose votes were in question in the present case, were interested in common with at least a hundred stockholders, and there were frequently more than three hundred operatives employed in the establishment. The Speaker said that, if, in any case, he was to be compelled to regard interests like these as grounds of exclusion under the rule, it would only be where the precedent for so doing was plain, precise, and unavoidable. He would follow in the steps which had been already taken in this line of construction, as it was his duty to do,—but he should adventure on no new tracks in a direction so contrary to his opinions of policy and justice. And, if he must err at all, he should always endeavor to err on that side, which should insure the greatest freedom of voice and vote to those who held their seats in the House by the same title with himself, and who had all the constitutional qualifications for a full, equal, and unrestrained exercise of the privileges of membership.

In reply to the reasons of the Speaker, Mr. Allen of Northfield, among other remarks, alluded to the fact that he had ascertained that there were 220 bank stockholders in the House in 1838, when the original decision of the Speaker was sustained, and said that under such circumstances he had no great respect for that precedent. Mr. Tarbell of Peppere‖, also, in combating the conclusions of the Chair, cited the following passage from Mr. Jefferson's manual:

"*Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice has been disallowed, even after a division. In a case so contrary, not only to the laws of decency, but to the fundamental principle of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the House that this rule, of immemorial observance, should be strictly adhered to.*"—2 Hats. 119. 121. 6 Grey, 368.

In answer to these and some other remarks, the Speaker said, that he had the highest respect for this opinion of Mr. Jefferson, but that it was borrowed almost word for word from Mr. Hatsell's work, and rested on the authorities which Mr. Hatsell cited. It was therefore to be interpreted agreeably to those authorities. He found, moreover, in the very language which Mr. Jefferson had quoted, additional reason for adhering to his own opinion. The same rule, it would be perceived, which required a member not to vote, required him also to *withdraw* during the debate. Such a provision clearly implied an interest in the highest degree personal and immediate. It seemed to suppose a case in which the House would be embarrassed by the presence of the member—where they might wish to indulge in scrutinies as to his conduct or circumstances which could not be freely entered on in his own hearing. And Mr. Jefferson had adopted no provision in his Manual to exclude a vote in any case where it was not also provided that the member should withdraw. Now, could it be imagined that the case before the House was contemplated in this rule? Would any gentleman have seriously proposed that the three Stockholders in question should withdraw in order to secure to the House a greater latitude for debate? Was there any thing which gentlemen could say on the subject behind the back of these Stockholders, which they would not be willing to say before their faces? The provision for a previous withdrawal, evidently implied, therefore, a close construction of the rule. The case in Grey to which Mr. Jefferson referred, was one of *impeachment*, and entirely sustained this view.

As to the fact stated by the gentleman from Northfield, it was one which only confirmed the Chair in the propriety of his decision in the case referred to. He was not aware, at the time, nor had he ever heard until now, that there were 220 Bank Stockholders in the House that year. He could not help thinking that the number had been over-estimated. But if it were so, if it were indeed true that the point of order which was raised on that occasion and which the gentleman from Northfield still thought was rightly raised and wrongly decided, if it were true that it involved no less a question than whether 220 members of the House should be disfranchised in relation to all the questions on the subject of Banks and Banking, which occupied, as the Journals would show, so very large a portion of that long session, he rejoiced that by no want of experience or reflection was he led to give his official sanction to so monstrous a proscription. It was a sufficient reason in his own mind for abandoning the rule and the precedents altogether, if they could in any case lead to a result so subversive of the equality of representation and almost of the very existence of the House.

The decision of the Speaker was sustained, 259 to 189.